INDEX

CITATIONS

Cases

Statutes

Federal

Pennsylvania

Miscellaneous

IN THE

Supreme Court of the United States

October Term 1938

No. 56

JOSEPH GARNER and A. JOSEPH GARNER, trading as CENTRAL STORAGE & TRANSFER COMPANY,

Petitioners

v.

TEAMSTERS, CHAUFFEURS and HELPERS, LOCAL UNION No. 776 (A.F.L.), *et al*

BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

INTRODUCTION

This brief *amicus curiae* is submitted by the Congress of Industrial Organizations with the consent of the parties, as provided for in Rule 27 of the Rules of this Court. It is submitted by the CIO because of the importance of the issue involved to all labor organizations, which would be subjected to the cumulative and conflicting imposition of the sanctions provided for by both federal and state labor relations laws if the decision below were reversed.

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions involved here are set out in Appendix A to this brief, pages 23-27.

STATEMENT

The company (Central Storage and Transfer Company) is engaged in the trucking business and its operations affect interstate commerce. The union (Teamsters Local Union No. 776) represented a few, but not a majority, of the company's employees. On June 7, 1949, the union began peaceful picketing of the employer's place of business.

The purpose of the picketing, according to the union, was "advertising" to persuade the employees to join the union. The union neither requested the employer to compel its present employees to join the union, nor did it demand that those employees be discharged in favor of union members (Finding 27, R.177a). Indeed, as found by the trial court, the union's policy with respect to the compulsion of union membership was to insert in its contracts with employers a union shop provision pursuant to a certificate of authority issued by the National Labor Relations Board (Finding 33, R.178a). Under the law in effect at that time, such a certificate could be obtained with respect to any bargaining unit only after a majority of the employees in that unit had voted, in a secret ballot election, to authorize a union shop.[1]

The picketing caused some financial loss to the company and it instituted suit to enjoin it, alleging that it constituted a course of conduct intended or calculated to coerce the company to require its employees to become members of the union.

The trial court after hearing evidence found the above facts and concluded that the picketing went "beyond the field of persuasion for organizational purposes into the field of intimidation or business compulsion deliberately designed to coerce Central, by causing it substantial business losses, to compel or require its employees to become members of the union" (Finding 40, R.179a). It issued both preliminary (R.102a) and final (R.202a, 228a) injunctions. On appeal, the Supreme

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[1] §§ 8(a)(3) and 9(e)(1) of the National Labor Relations Act, as amended in 1947, 61 Stat. 141, 144, 29 U.S.C. (Supp. I) 158(a)(3) and 159(e)(1). In 1951, after the trial of this case, § 9(e)(1), which provided for the union shop authorization election, was deleted from the Act and § 8(a)(3) correspondingly amended. 65 Stat. 601. 29 U.S.C. (Supp. V) 158(a)(3) and 159(e)(1).

Court of Pennsylvania reversed and ordered that the complaint be dismissed. The company petitioned for certiorari and the writ was granted.

ARGUMENT

I

THE DECISION OF THE SUPREME COURT OF PENNSYLVANIA DOES NOT REST ON AN ASSUMPTION THAT THE UNION COMMITTED AN UNFAIR LABOR PRACTICE.

The basic facts in this case are extremely simple, and there was no controversy in the Pennsylvania courts as to what actually happened. The exact nature of the legal issue presented for decision in this Court, however, is somewhat complicated by the peculiar frame of reference established by the Pennsylvania statutes and decisions, the sometimes contradictory positions taken by the parties at various stages of the litigation and the failure of the Supreme Court of Pennsylvania to base its decision on the facts, as found at the trial. The result is that it would appear, at least from petitioner's brief, and perhaps from the others, that the problem of federal-state relationship to be decided by this Court arises from the commission by the union of acts which constitute an unfair labor practice under the National Labor Relations Act, as amended. The entire brief of the petitioner in this Court is based on the assumption that the Supreme Court of Pennsylvania decided that the union violated Section 8(b) of the federal Act and that, therefore, the state courts could not also enjoin the union's action as violative of the state's labor relations policy.

This assumption is false. Although the question of whether the union had committed an unfair labor practice under the Act was litigated, it was not decided by the Pennsylvania Supreme Court. Nor, we believe, is resolution of the question required in this Court. The Pennsylvania Supreme Court decided this case without either deciding that a federal unfair labor practice in fact occurred, or assuming any decision on that question from the pleadings, and this Court should do the

same. This, we believe, can be shown by examining carefully the Pennsylvania law, the contentions of the parties below, and the decision of the Supreme Court of Pennsylvania.

A. The Legal Framework

1. The Original Federal and State Legislation. The National Labor Relations Act was enacted in 1935. In 1937, Pennsylvania enacted its Labor Relations Act. Act of June 1, 1937, P.L. 1168, No. 294, 43 U.S. §§ 211.1 - 211.13. So far as relevant here, the two were identical.

Section 8(3) of the federal Act provided that it should be an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization . . ." 29 U.S.C. §158(3). Excepted from this provision were union shop or closed shop agreements executed by an employer with a labor organization representative of its employees.

Section 6(1)(c) of the Pennsylvania Labor Relations Act, 43 P.S. § 211.6(1)(c), was an exact replica of Section 8(3) of the National Labor Relations Act. Under both statutes, it would be unlawful for an employer to require his employees to join a union, except pursuant to a union shop agreement negotiated with a union representative of his employees.

The Pennsylvania law imitated the federal law in a further respect. In 1937, Pennsylvania also enacted its "Labor Anti-Injunction Act". Act of June 2, 1937, P.L. 1198, 43 P.S. §§ 206a-206q. This act was modeled after the Norris-LaGuardia Act which had been enacted earlier by the federal government.

From the terms of the Anti-Injunction Act, as well as from the terms of Section 8(a) of the Pennsylvania Labor Relations Act (43 P.S. § 211.8(a)), which made the jurisdiction of the Pennsylvania Labor Relations Board "exclusive", it was clear that if a union were to attempt, by peaceful picketing, to coerce an employer to compel his employees to become members of the union, no injunction against such activity could be obtained from the Pennsylvania courts. The virtually identical provisions of the Federal Act accomplished, of course, the identical result. Conduct of the kind alleged to be involved in

this case, therefore, was not reachable by either federal or state authority.[3]

2. The Pennsylvania Amendments (1939). On June 9, 1939, Pennsylvania amended both its Labor Relations Act and its Anti-Injunction Act. Act of June 9, 1939, P.L. 293; Act of June 9, 1939, P. L. 302. The amendments to the Labor Relations Act established a series of union unfair labor practices in much the same way as was ultimately done in 1947 in the federal Act. They did not, however, make it an unfair labor practice for a labor organization to cause an employer to compel his employees to become members of a union in violation of Section 6(1)(c) of the Pennsylvania Act. Such activity by a labor organization was dealt with, instead, by amendment of the Anti-Injunction Act.

Two relevant amendments were made to the Anti-Injunction Act. The amendment cited by the Supreme Court of Pennsylvania in its decision in this case removed from the scope of the Anti-Injunction Act cases in which a labor organization "engages in a course of conduct intended or calculated to coerce an employer to commit a violation of the Pennsylvania Labor Relations Act of 1937 or the National Labor Relations Act of 1935." 43 P.S. § 206d(c), as added by the Act of June 9, 1939, P.L. 302, §1. An additional amendment (43 P.S. §206d (b)) provided that where a majority of employees had not joined a labor organization, or where two or more labor organizations were competing for membership of the employees, the Anti-Injunction Act should not apply if a labor organiza-

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[3] The Pennsylvania Labor Relations Act, in its original form, was expressly limited to employer-employee relationships to which the federal Act was inapplicable. Section 3(c) of the 1937 Act excluded from the definition of "employer" any person subject to the provisions of the National Labor Relations Act. See *Abbott's Dairies Case*, 341 Pa. 145, 19 A. 2d 128 (1941).

The Pennsylvania Legislature reacted to the decision of the Pennsylvania Supreme Court in *Abbott's Dairies Case* by amending the Pennsylvania Act to omit this exclusion. Act of May 27, 1943, P.L. 741, Section 1. The Supreme Court of the State, however, refused to permit the Pennsylvania Board to exercise the jurisdiction which was thus enlarged, holding that, "wherever the employer-employee relationship is on over which * * * Congress has acted, State power is suspended and cannot constitutionally be exercised." *Pittsburgh Railway Employees Case*, 357 Pa. 379, 386, 54 A. 2d 891 (1947); *Pennsylvania Labor Relations Board* v. *Frank*, 362 Pa. 537, 67 A. 2d 78 (1949).

tion engaged in a course of conduct intended or calculated to coerce the employer to compel his employees to become members of that organization.

As applicable here, both of these amendments accomplished the same result. It was, and still is, an unfair labor practice for an employer to compel his employees to join a labor organization except pursuant to a proper union shop contract. Action by a union to coerce an employer to take the action described in 43 P.S. 206d(b) would necessarily, therefore, be action which would coerce the employer to commit an unfair labor practice, in violation of both the federal and state Acts.[*] The effect of both amendments then, was to bring within the purview of the courts, rather than the Pennsylvania Labor Relations Board, activity by a union which would cause an employer to violate the Pennsylvania Labor Relations Act or the National Labor Relations Act. If the union was successful in causing such employer action, the employer could be reached only by a Board proceeding, either federal or state. The union's conduct, however, was made subject to the injunctive jurisdiction of the state courts. And this grant of jurisdiction (or, more accurately, relaxation of a jurisdictional bar) was treated by the Pennsylvania Courts as creating a substantive cause of action. See *Tankin* v. *Hotel and Restaurant Workers*, 36 D. & C. 537 (Ct. of Common Pleas, 1939) cited with approval in *De Wilde* v. *Scranton Bldg. Trades*, 343 Pa. 224, 229 (1941); *Wilbank* v. *Bartenders Union*, 360 Pa. 48, 60 A. 2d 21 (1948) *cert. den.*, 336 U.S. 945.

3. The Federal Amendments (1947). The amendments to the National Labor Relations Act, contained in the Labor Management Relations Act, 1947, were directed, in part, to the same problem covered by the 1939 amendments to the Pennsylvania statutes. The Pennsylvania pattern, however, was not adopted. Union action to compel an employer to violate Section 8(a)(3) of the federal Act was not made initially enjoinable in the courts, as in Pennsylvania, but an unfair labor practice under Section 8(b)(2), which provided

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[*] Prior to 1943, only employers not subject to the National Labor Relations Act could violate the Pennsylvania Labor Relations Act. See footnote 2, page 5, *supra*.

that it should be an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of Sub-section (a)(3) . . .".

Thus, under the federal Act and the Pennsylvania Act, it is an unfair labor practice for an employer to require his employees to join a union (except pursuant to a proper union shop contract). Under the Pennsylvania law action by a union "intended or calculated to coerce an employer" to commit such an unfair labor practice is enjoinable in the courts. Under the federal Act, action by a union "to cause or attempt to cause an employer" to commit the identical unfair labor practice is itself an unfair labor practice.

B. The Contentions of the Parties Before the Pennsylvania Courts

Essential to the company's case in the Pennsylvania courts, both as a jurisdictional matter and as a matter of substance, was the claim that the picketing here was "intended or calculated to coerce an employer" to require his employees to join the union. Since there was no dispute as to the actual facts in the case, there were only two basic questions before the trial court. First, could it be said that a union, which made no request at all of an employer, and which, as a matter of policy, never required the employees of any employer to join the union until a majority of them had affirmatively authorized such action by a secret ballot election conducted by the N.L.R.B., nevertheless engaged in a course of conduct intended or calculated to coerce an employer to require his employees to become members of the union because it engaged in simple organizational picketing urging the employees to join the union? Second, if such a conclusion could be drawn on the undisputed facts, would the state courts jurisdiction be ousted because the picketing also violated Section 8(b)(2) of the federal Act as action "to cause or attempt to cause an employer" to require his employees to join the union?

Both of these issues were explicitly litigated and explicitly decided by the trial court. The trial court found, first, that the picketing was intended or calculated to coerce the employer to require his employees to join the union. Based on this first

finding it concluded: (1) the Pennsylvania Anti-Injunction Act was not applicable, (2) that a substantive case had been made out by the employer that the picketing was not constitutionally protected free speech, and (3) that no rights protected by Section 7 of the National Labor Relations Act would be infringed by an injunction. On the second major issue it explicitly held that the conduct of the union nevertheless did not constitute a violation of section 8(b) of the federal Act.

In the argument before the Pennsylvania Supreme Court the issues remained drawn in exactly the same fashion as they had been drawn in the trial court. The company argued that the picketing was intended or calculated to coerce it to require the employees to become members of the union, but that, nevertheless, no violation of Section 8(b) of the federal Act was involved.[1] The union argued first, that the finding of the trial court as to the intention of the picketing was unsupported by the evidence, and, second, that if the finding was correct, there was a violation of Section 8(b) of the federal Act.

The Supreme Court of Pennsylvania reversed the decision of the trial court. It did so, however, on reasoning which touched neither of the major contentions of the parties.

Although the case was before it on appeal from a final injunction after trial of the facts, the Supreme Court appeared to treat the case as if it arose on demurrer or motion to dismiss. It did not, therefore, determine whether the trial court's findings were supported by the evidence. Nor, on the other hand, did it decide whether, if the facts alleged in the complaint were assumed to be true, there was a violation of Section 8(b) of the federal Act. The court, in effect, refused to decide either of the questions argued by the parties.

How, then, did the Supreme Court of Pennsylvania dispose of the case? If the court's opinion is read carefully in light of the Pennsylvania statutory background, its reasoning can be paraphrased as follows: If the company required its employees to become members of the union, the company would violate Section 8(a)(3) of the amended National Labor Relations Act and the practically identical Section 6(c) of the Pennsylvania Labor Relations Act. Action by a labor organization to cause

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[1] See Point II, below, and appendix B.

an employer to commit such an unfair labor practice is an unfair labor practice under Section 8(b)(2) of the federal Act; it is enjoinable by our courts under the 1939 amendments of the Pennsylvania Anti-Injunction Act. We consider the Pennsylvania law as having identically the same scope as the federal law. The only difference between them is that under the federal Act the remedy is in an unfair labor practice procedure, while under the Pennsylvania law the remedy is by injunction. Therefore, the picketing here either violated both Acts, or violated neither. If it violated neither Act, of course, there was no cause of action and the picketing was constitutionally protected (citing *Carnegie Illinois Steel Corp.* v. *United Steelworkers of America*, 353 Pa. 420). If the picketing violated both Acts, then the question of whether the federal Act preempts the field is presented. We decide that Congress intended to prevent states from enforcing prohibitions identical to those contained in the federal Act. Therefore we decide that the trial court had no jurisdiction even to consider the complaint since, even if the state law were violated, the court would have no jurisdiction to issue an injunction.

It is important to note that the Pennsylvania Court did not look at the facts either as alleged or proven. It did not say that a violation of both the state and the federal acts had, in fact, occurred, or assume that one had occurred. It said only that the state law was identical with the federal law, that there was, therefore, either a violation of both or a violation of neither, and that, in either eventuality, the trial court would have no jurisdiction.

C. The Issue Presented to This Court

In this state of affairs, what is the precise issue presented to this court? It is clear what the issue is not. It is not whether the conduct alleged in the complaint or proved at the trial constituted an unfair labor practice under the National Labor Relations Act, as amended. Nor is the issue, in our view, whether the acts complained of were protected concerted activity under Section 7 of the Act.

One of the issues in the case, in the Supreme Court of Pennsylvania, concerned the substantive law of Pennsylvania. The

Supreme Court of Pennsylvania had to decide whether, as a matter of state law, the substantive law of Pennsylvania, with respect to organizational picketing, was broader, narrower, or the same as the federal law. It could have decided that question only insofar as it was presented by the particular facts involved in the case. But it chose not to do so. It ignored the facts developed at the trial and, looking at the question more broadly, held simply that the Pennsylvania statutes should be construed as having identically the same scope as the federal statute. Upon this determination it predicated its ultimate holding in the case.

Whether the Pennsylvania Supreme Court was right in its decision to so fashion its determination as to the scope of the state law against picketing is, of course, not open to this Court. This court must accept the interpretation of Pennsylvania law given by the Supreme Court of the State.

What is left, then, for this Court to decide?

In our view, the holding of the Pennsylvania Supreme Court leaves only for decision by this Court the narrow question of whether state law making it unlawful to coerce an employer to violate the National Labor Relations Act, or the identical provisions of the Pennsylvania Labor Relations Act, can be enforced with respect to an employer subject to the federal law.

II

NO UNFAIR LABOR PRACTICE OCCURRED HERE

The answer to the issue which we have described in Point I above is governed, we concede, by the same considerations as the answer to the issue posed by the petitioner. Argument by the parties, and others, which is made on the assumption that an unfair labor practice, in violation of Section 8(b) of the federal Act, actually occurred are not wide of the mark. Our purpose in making the distinction set forth in Point I is not to undercut the arguments of the parties but, rather, to avoid any possibility that the Court will be led inadvertently to label the union's conduct here as an unfair labor practice, thus making what we believe would be an erroneous, but necessarily governing, interpretation of Section 8(b) of the federal Act. In this Point, we will set forth our reasons

for believing that, if the Court should examine the facts, it would have to conclude that there was no unfair labor practice.

Before going into the discussion, we think it worth while to note that the company has completely reversed its position with respect to this issue. As we have stated above, the company urged strongly in the Pennsylvania Courts that the conduct of the union which it complained of did not constitute an unfair labor practice under the federal act. It succeeded in persuading the trial court of the correctness of this contention, and the trial court specifically held (R.185a-187a, Conclusion of Law No. 8, R.201a) that no violation of Section 8(b) of the National Labor Relations Act was involved.

On appeal to the Pennsylvania Supreme Court, the Company continued to take the same position. So that there may be no mistake about the matter, we reprint, as Appendix B to this brief, the portion of the Company's brief before the Pennsylvania Supreme Court with respect to this question.

In this Court, the company has completely reversed its field. It now argues, on page 84 of its brief, that

> ". . . Section 8(b)(2) makes it an unfair labor practice for a labor organization to attempt to cause an employer to discriminate against an employee in violation of Section 8(a)(3) to encourage or discourage membership in any labor organization. While the trial court, under then-narrow decisions of the National Labor Relations Board (R.186) such as *United Brotherhood of Carpenters and Joiners of America, etc.* (Wadsworth Building Co., Inc.), 81 N.L.R.B. 802, had held that the picketing was not outlawed by the Labor Management Relations Act, the decision of the Supreme Court of Pennsylvania that Section 8(b)(2) does apply to this picketing (R. 232) is sustained by the more recent progress in the decisions of the National Labor Relations Board toward the original congressional intention, *Denver Building Trade and Construction Trades Council*, (Henry Shore), 90 N.L.R.B. 1768, 1769-1770, *Sub Grade Engineering Company*, 93 N.L.R.B. 406, 407-408, and Appendix B, infra."

One of the "more recent" decisions of the National Labor Relations Board, which is said to have changed its position since the trial of this case, was, in fact, discussed by the company itself before the Pennsylvania Supreme Court. Both of

them were, in fact, decided before final adjudication in the trial court, and neither of them have anything to do with the issue here.[5]

We do not pretend to be able to understand the motivation behind the Company's shift of position, particularly since the shift appears to render its position on the pre-emption issue substantially more difficult to sustain. The fact that the company now concedes that Section 8(b) of the federal Act applies to the union's conduct here should not, however, persuade this Court to make any such assumption.

Before the trial court the union took the position that the only purpose of this picketing here was to persuade the employees of the company to join the union. The trial court found it difficult to believe this. It said that the picketing in fact persuaded no employees, but had the inevitable effect of putting economic pressure upon the employer. It noted that the union did not attempt any personal solicitation of the employees. The court inferred, therefore, that the union had an ulterior motive, that it intended in some manner, by putting pressure upon the employer, ultimately to secure the member-

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[5] In the *Wadsworth* case, 81 N.L.R.B. 802, the issue was whether Section 8(c) of the Act—the so-called free speech provision—modified Section 8(b)(4)(A)—the secondary boycott provision—so as to exclude peaceful picketing from the ban on secondary boycotts. The Board held, by a 3-2 vote, that Section 8(c) did not insulate such picketing from Section 8(b)(4)(A). The opinions of the Board members indicated, however, that 8(c) would have the effect of removing peaceful picketing, not accompanied by threat of reprisal or promise of benefit, from the scope of Section 8(b)(2). (See the Intermediate Report of the Trial Examiner in *Denver Building Trades & Construction Trades Council*, 90 N.L.R.B. 1768, at pp. 1781-1782). In the *Denver Building Trade* case, decided in August, 1950, the Board reversed its prior suggestion and held that peaceful picketing could violate Section 8(b)(2). *Sub-Grade Engineering Company*, 93 N.L.R.B. 406, deals with the proof necessary to show that a union in fact "caused" discriminatory discharges which the employer had committed.

It is hard to see how the *Sub-Grade* case can even be argued to be relevant. The earlier two cases would be relevant if it were first assumed that the object of the union here was to obtain a closed shop contract or a union shop contract not complying with Section 8(a)(3). A second question then would be whether peaceful picketing constituted an "attempt to cause" such a violation. But it is the first question of course, which is the one in issue here. The Trial Examiner's report in the *Denver Building Trades Case* is particularly clear in distinguishing the two different issues, 90 N.L.R.B. 1768, at pp. 1780-1781.

ship of its employees in the union. On this basis, it issued its injunction.

Until the Supreme Court of Pennsylvania issued its decision in this case it might, perhaps, have been assumed that the law of Pennsylvania was that picketing for such a purpose was unlawful without regard to the specific demand which the union made upon the employer. Such, however, is not the federal law. Section 8(b)(2) of the federal Act makes it an unfair labor practice "to cause or attempt to cause an employer to discriminate against an employee in violation of Subsection (a)(3)". A violation of this Section must involve more than a generalized purpose somehow to obtain an employer's assistance in getting his employees into the union.

This is shown by a whole series of Labor Board cases, the most recent of which is *United Mine Workers of America (M. F. Fetterolf Coal Co.)* 103 N.L.R.B. No. 134, 32 LRRM 1028 (April 6, 1953). In the Fetterolf case the union representatives picketed a mine after stating to the superintendent that "they were going to picket all non-union mines in the area until the operators signed agreements with the union" (Trial Examiner's Report, p. 17). The picketing was conducted by about 200 or 300 pickets who threatened the employees and engaged in several acts of intimidation and violence. A complaint was issued charging that the union had violated both Section 8(b)(1)(A) and Section 8(b)(2) of the Act.

The Trial Examiner held that a violation of Section 8(b)(1)(A) of the Act had been proven by virtue of the restraint and coercion directed against the employees. He concluded, however, that no violation of Section 8(b)(2) had been shown, since the union had not specifically demanded an illegal security provision and it was not shown that obtaining such a provision was its clear objective. Cf. *National Maritime Union of America (The Texas Company)* 78 N.L.R.B. 971. The Board affirmed the ruling of the Trial Examiner, dismissing the complaint insofar as it charged a violation of Section 8(b)(2).

In an earlier case *Lumber and Sawmill Workers' Union (Santa Anna Lumber Co.)* 87 N.L.R.B. 937, the Board had made clear that, in its view, a violation of Section 8(b)(2)

would be shown only where the union insisted on the inclusion of a clause in a contract with an employer which would violate Section 8(a)(3), and where the clear objective of the union's activity was to compel the company to submit to such a demand.

If we disbelieve, as the trial court disbelieved, the union's testimony as to the purpose of the picketing, it by no means follows that the union's objective was to compel the employer to sign a contract which would violate the provisions of Section 8(a)(3). The union could have been picketing merely to obtain recognition by the employer. Perhaps it wanted the employer to use the freedom of expression guaranteed to him by Section 8(c) of the Act to persuade his employees to join the Union. Such persuasion, if unaccompanied by threats of reprisal or promises of benefit, would not constitute an unfair labor practice. *Heintz Mfg. Co.*, 103 N.L.R.B. No. 99, 31 LRRM 1594; *N.L.R.B. v. Corning Glass Works*, 204 F. 2d 422 (C.A. 1, 1953). If the Union did want the employer to sign a contract requiring union membership, its demand may very well have been only for the type of union shop arrangement permitted at that time by Section 8(a)(3) of the Act, viz: a requirement that all employees join the union within 30 days, subject to approval of the contract by a secret ballot election among the employees in an election conducted under Section 9(e)(1) of the Act.

There is absolutely nothing in the testimony in this case which would indicate that the union's objective was not only a union shop contract with the employer, but, in addition, a union shop contract which would violate the provisions of Section 8(a)(3). Indeed, the specific finding of the trial court that the union's policy was to conform its union shop provisions with the requirements of Section 8(a)(3) of the Act prohibits any inference of a contrary purpose in this case.

If anything can be inferred from the union's course of conduct in this case, the most that can be said was that the union was a minority union picketing an employer for recognition. It is crystal clear that such picketing itself does not constitute a violation of Section 8(b) of the Act. This is shown most clearly by Section 8(b)(4) of the Act. Section 8(b)(4) does

outlaw certain types of picketing for unlawful objectives. Specifically, sub-section (B) of Section 8(b)(4) makes picketing unlawful if its purpose is to require an employer *other than the one picketed* to bargain with a union not certified by the National Labor Relations Board. Sub-section C of Section 8(b)(4) makes picketing unlawful if its purpose is to require the employer who is picketed to bargain with the union, *if, but only if, another union has been certified by the National Labor Relations Board.* Simple minority picketing is not, and has never been, considered to be a violation of Section 8(b)(2).

In the Hartley bill, which passed the House in 1947, there was a specific provision which would have made it unlawful to engage in any concerted interference with an employer's operations if an object of such interference was to compel the employer to recognize a representative not certified by the Board as a representative of the employees.* No similar provision was contained in the Senate bill (S. 1126). The provisions of the House bill were omitted in conference. House Conference Report 510 on H.R. 3020, 80th Cong., 1st Sess. p. 59. Insofar as we are aware, it has never since been contended that a strike, picketing, or other concerted activity, purely for recognition, if unaccompanied by violence and not involving third persons, constitutes a violation of any provision in Section 8(b) of the federal Act. Cf. *Goodwins* v. *Hagedorn*, 303 N. Y. 300, 101 N. E. 2d 697, in which the New York Court of Appeals held that such picketing could be enjoined by the states *because* it was not a violation of Section 8(b).

We conclude, therefore, that the most that can be inferred from the union's course of conduct here is that it sought to exert pressure upon the employer to make some sort of concession to it. Such a concession might conceivably be recognition of the union, or execution of a union shop contract with the union. In the face of an explicit finding that the union's policy was to comply with Section 8(a)(3) in its union shop contracts, there is no basis upon which it can be assumed that the union's purpose was to obtain a union shop provision of a

*H.R. 3020, 80th Cong., 1st Sess. § 12(a)(5)(C).

type not permitted by Section 8(a)(3). Under such circumstances, there is absolutely no basis upon which it can be urged that the union's conduct here constituted a violation of Section 8(b)(2).

III

ON ANY VIEW OF THE DECISION BELOW, IT SHOULD BE IMMATERIAL WHETHER THE PICKETING HERE VIOLATED SECTION 8(b)(2) OF THE FEDERAL ACT

Having discussed above (1) the nature of the Supreme Court of Pennsylvania's decision and (2) the absence here of any violation of Section 8(b)(2) of the federal law, it is perhaps well to pause here for a moment to place these points in perspective and to relate them to the arguments of the parties. It seems to us that the various approaches to the federal-state problem here can be summarized as follows:

1. If we assume that the Pennsylvania labor relations law duplicates the federal law exactly, can the state law be enforced in any case involving an employer subject to the federal law?

This is the question which the Supreme Court of Pennsylvania answered in the negative.

2. If we look at the particular case presented, did the union violate Section 8(b)(2) of the federal Act? If the answer to this question is "yes", does the fact that the union conduct is forbidden by the federal law prevent the state from enforcing its law?

This is the question argued by the Company in this Court.

3. If the answer to question 2 is "no", i.e., if the union did not violate the federal law, but did violate the state law, and if the Union's conduct is not protected activity under Section 7 of the federal law[1] does the federal law, nevertheless, pre-empt the field so as to prevent the state from enforcing its law?

In our view, the first approach set forth above is the correct approach. Certainly it is the one taken by the Supreme Court of Pennsylvania. For the reasons set forth in Point II above, we think that the second approach—the one taken by

[1] If the activity is protected, of course, the state cannot forbid it. *Automobile Workers* v. *O'Brien*, 339 U.S. 454; *Amalgamated Association* v. *Wisconsin E.R.B.*, 340 U.S. 383.

the company in this Court—is based upon a misconception of the federal law. On either approach, however, the answer to the federal state problem is the same, and we assume that the parties, and the National Labor Relations Board will deal with the argument adequately in their briefs, although it may very well be that argument is no more required on this point than was an opinion by this Court when the identical question was decided in *Plankinton Packing Co.* v. *Wisconsin E.R.B.*, 338 U. S. 953.

The question presented in the third approach is the crucial undecided question in this field of the law. The Court may not, and indeed should not, reach that issue, and we will, therefore, not discuss it at length. We should, however, like to offer, for whatever bearing it may have on the manner in which this Court decides the issues directly presented by this case, what we regard as a pertinent observation on this issue.

We assume that it is now established that a state may not forbid concerted protected activities which Congress has protected under Section 7 of the National Labor Relations Act, *Automobile Workers* v. *O'Brien*, 339 U.S. 454; *Amalgamated Association* v. *Wisconsin E.R.B.*, 340 U.S. 383. We also assume that it is also settled that conduct which Congress has specifically forbidden as an unfair labor practice may not be additionally prosecuted for violation of state labor relations policy, *Plankinton Packing Co.* v. *Wisconsin E.R.B.*, 338 U.S. 953. The question which is not clearly settled is whether the states may enforce their own labor relations policy to forbid conduct which is neither forbidden activity nor protected activity under the federal Act. To put the question in another way, is it the law that state labor relations law may be applied in a situation involving interstate commerce, if it is shown affirmatively that the particular activities involved are neither protected activities under Section 7 of the federal Act nor forbidden activities under Section 8?

We respectfully submit to the Court that no rule of law set down by this Court should permit such a case by case approach. We believe that if the decision of this Court in *Automobile Workers* v. *Wisconsin E.R.B.*, 336 U.S. 245, be construed as establishing an area between the protected ac-

tivities on the one hand and forbidden activities on the other, in which the states are free to apply their own labor relations policy, this Court should specifically overrule that case.

We can put our argument in support of this contention in terms of the traditional "pre-emption of the field" language. We think that the same purpose can be served, however, by simply pointing out to the Court one consequence of any such rule. That consequence is that inferior tribunals in each of the 48 states are met with the necessity of deciding, in any case in which state labor relations policy is sought to be enforced where interstate commerce is involved, whether the particular conduct involved in the case constitutes concerted protected activity or an unfair labor practice under the Labor-Management Relations Act.

In each such case, the inferior state tribunal must decide, without the benefit of investigation or participation of the National Labor Relations Board, whether the particular activity involved constitutes protected concerted activity under Section 7 of the Act and whether it constitutes an unfair labor practice under any of the Sub-sections of Section 8 of the Act. Only if both questions are answered in the negative can the court find that it has jurisdiction to enter the field and apply the state's labor relations policy.

If precise lines were drawn in the federal statute to indicate what is protected activity and what is forbidden activity, this consequence would be serious enough. But one of the essential attributes of the National Labor Relations Act is that it sets down only broad general lines to guide an expert administrative board in making its determinations. As this Court knows, questions of what is concerted protected activity under the Act are not free from difficulty. See *National Labor Relations Board* v. *Local Union 1229, I.B.E.W.*, Sup. Ct. of the United States, October Term, 1953, No. 15. Nor are questions of what constitutes forbidden activity susceptible of easy determination, at least initially, by courts unfamiliar with the background and framework of the federal statute. Here an example exists which proves the point rather clearly.

In *Automobile Workers* v. *Wisconsin E.R.B.* this Court apparently determined that the particular conduct involved

was neither protected by the federal Act or forbidden by it, and that, therefore, the state could prohibit it. It reached this conclusion in a case brought to the court by private litigants and without the benefit of any prior determination by the National Labor Relations Board. That such a method of decision may result in gross errors by the multitude of inferior tribunals to which the doctrine of that case apparently would commit the negative application of federal law, is demonstrated by the fact that even this Court committed, in the very case, what on examination is fairly easily seen to be a major error as to the scope of the Act.

In the *Automobile Workers* case, the activity involved was a program of intermittent work stoppages, occurring over a period of time. "The employer was not informed during this period of any specific demands which these tactics were designed to enforce, nor what concessions it could make to avoid them," 336 U.S. 245, at 249. Because this case was not heard in the normal course by the National Labor Relations Board, attention was focused on whether the intermittent character of the work stoppages removed them from the protection of Section 7 of the Act. Although it was not noticed by the court, the really serious question involved in that case was not whether the activity was protected by Section 7, but whether it was forbidden by Section 8. Section 8(b)(3) of the amended federal Act makes it an unfair labor practice for a union to refuse to bargain collectively with an employer. The application of economic pressure and the institution of a program of concerted activities, whether intermittent or not, without informing the employer what the nature of the union's demands are, or "what concessions it could make to avoid them", may be regarded, without too much question, as a violation by the union of Section 8(b)(3).

Thus, in the very case in which the Court apparently established the doctrine that the state courts could enforce state labor policy in the areas between the protected and the forbidden, it demonstrated by example the inevitable unfortunate consequences of such a doctrine—that erroneous decisions as to what constitutes an unfair labor practice and what constitutes protected concerted activity will be made by tribunals

not having the benefit of the expert body which Congress established to determine such questions in the first instance.

The lesson to be drawn from the error which the Court inadvertently committed in the *Automobile Workers* case is, we think, clear. The whole scheme of the federal Act is disrupted by holding that the states cannot prohibit activities which are protected by the Act or punish those which are forbidden by the Act, but can apply their own labor policy to conduct not falling within either category. For in so holding, the court converts the orderly process of adjudication by an expert board which Congress has established into a completely different system of adjudication, in which the same questions can be litigated and decided initially by state courts, subject only to review in this Court, all as a preliminary to determining whether the states are free to act in the particular circumstances.

It is almost impossible to convey to this Court the difficulties involved in arguing a question of federal labor relations law to a chancery court in a rural judicial district. The judge often has no experience in such matters. The complex federal law, with its multifarious sub-sub-sections, may be entirely new to him. He has no access to reports of the National Labor Relations Board. Yet he is asked, on an application for a temporary restraining order or preliminary injunction, to decide quickly whether an employer seeking relief from him is seeking relief against an activity protected by the federal Act and, if not, whether the employer is entitled to relief before the National Labor Relations Board.

The result of such a system of adjudication cannot fail to injure activities which Congress genuinely meant to protect. Strikes which are enjoined by a state court in the mistaken belief that they are, for some reason, not protected by the federal acts may be effectively, and permanently, defeated, irrespective of ultimate reversal of that decision on appeal to this Court—if, indeed, appeal can be taken before the controversy becomes moot. Cf. *Building Union* v. *Ledbetter Co.*, 344 U.S. 178 and *Building Trades Council* v. *Kinnard*, No. 48, this Term. And the ultimate decision on the question of federal

law may, in fact, be grossly in error simply because the case is not processed through the channels which Congress provided for the determination of such questions.

If this Court should decide that the narrow ground for decision which we have heretofore urged is not available to it—that is to say, if this Court should decide that it cannot dispose of this case on the assumption that the Pennsylvania statute is identical with the federal statute, and hence must fall under the rule of the *Plankinton* case—then we respectfully urge the Court to decide more broadly, that irrespective of whether the state law here precisely corresponds with the federal law, the Court will not examine into the particular facts to find out whether the activity here is forbidden or protected by the federal Act.

The Court should, rather, repeat what it said in *Bethlehem Co.* v. *State Board*, 330 U.S. 767, 776: "We do not think that a case by case test of federal supremacy is permissible here." "Congress has occupied this field and closed it to state regulation." *Automobile Workers* v. *O'Brien*, 339 U.S. 454, 457.

We do not mean to suggest, of course, that actions which would be individually illegal under state law are insulated from state action because committed in a labor relations context. We do not say that "otherwise illegal action is made legal by concert," 336 U.S. 245, 258. We say, rather, that state labor relations law and state labor relations policy, which are applicable *only* because a management-union situation is presented, should not be permitted to apply where the federal law applies. Such actions as destruction of property, or seizure of another's premises, are unlawful whether committed by unions or by individuuals. State laws which are applicable to all and cut across labor relations lines certainly can be used to prevent or punish such action, irrespective of whether they are committed in concert or alone. But State laws defining and limiting permissible union activity and designed to further the states' own labor relations policy, which is what we have here, cannot co-exist with the federal law if the Congressional purpose is to be fulfilled.

CONCLUSION

In this brief *amicus curiae* we have not attempted to reargue the issues which we assume will be dealt with directly by the parties. Our endeavor has been, first, to help the Court focus its attention on what we believe to be the precise issue presented by the case; second, to avoid any possibility that the Court will inadvertently make an erroneous assumption concerning the applicability of Section 8(b)(2) of the federal Act to the conduct here involved; finally, to submit what we believe is a pertinent consideration in viewing the entire preemption problem in this field.

Respectfully submitted,

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APPENDIX A

In this appendix, we set forth for the convenience of the Court what we believe are the relevant federal and state statutes, in the order of their enactment.

1935

Section 8(3) of the National Labor Relations Act of 1935, as originally enacted, 49 Stat. 452, provided as follows:

"SEC. 8. It shall be an unfair labor practice for an employer—* * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U.S.C. Supp. VII, title 15, Secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in Section 9(a), in the appropriate collective bargaining unit covered by such agreement when made."

1937

The Pennsylvania Labor Relations Act, Act of June 1, 1937, P.L. 1168, No. 294, as originally enacted provided, in part, as follows:

"Section 3. Definitions. When used in this act—* * *

(c) The term 'employer' * * * shall not include * * * any person subject to the Federal Railway Labor Act or the National Labor Relations Act, as amended from time to time, * * *

Section 6. Unfair Labor Practices—It shall be an unfair practice for an employer—

* * *

(c) By discrimination in regard to hire or tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this act, or in any agreement approved or prescribed thereunder, or in any other

statute of this Commonwealth, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in this act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employes, as provided in section seven (a) of this act, in the appropriate collective bargaining unit covered by such agreement when made * * *."

"Section 8. Prevention of Unfair Labor Practices. —

(a) The board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice listed in section six of this act. This power shall be exclusive and shall not be affected by any other means of adjustment or prevention that may have been or may be established by agreement, law or otherwise."

1939

The Act of June 9, 1939, P.L. 302, No. 163, amended the Pennsylvania Labor Anti-Injunction Act, as follows (material added by the amendment in italics):

"Section 4. No court of this Commonwealth shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case included within this act, except in strict conformity with the provisions of this act, nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this act. Exclusive jurisdiction and power to hear and determine all actions and suits coming under the provisions of this act, shall be vested in the courts of common pleas of the several counties of this Commonwealth: *Provided, however, That this act shall not apply in any case—*

*(a) Involving a labor dispute as defined herein, which is in disregard, breach, or violation of * * * a valid subsisting labor agreement arrived at between an employer and the representatives designated or selected by the employes for the purpose of collective bargaining, as defined and provided for in the [Pennsylvania Labor Relations] act * * * and amendments thereto, or as defined and provided for in the National Labor Relations Act * * *: Provided, however, That the complaining person has not, during the term of the said agreement, committed an act as defined in both of the aforesaid acts as an unfair labor practice * * *

(b) Where a majority of the employes have not joined a labor organization, or where two or more labor organizations are competing for membership of the employes, and any labor organization or any of its officers, agents, representatives, employes, or members engages in a course of conduct intended or calculated to coerce an employer to compel or require his employes to prefer or become members of or otherwise join any labor organization.

(c) Where any person, association, employe, labor organization, or any employe, agent, representative, or officer of a labor organization engages in a course of conduct intended or calculated to coerce an employer to commit a violation of the Pennsylvania Labor Relations Act of 1937 or the National Labor Relations Act of 1935.

(d) Where in the course of a labor dispute as herein defined, an employe, or employes acting in concert, or a labor organization, or the members, officers, agents, or representatives of a labor organization or anyone acting for such organization, seize, hold, damage, or destroy the plant, equipment, machinery, or other property of the employer with the intention of compelling the employer to accede to any demands, conditions, or terms of employment, or for collective bargaining."

1943

The Act of May 27, 1943, P.L. 741, No. 315, amended the Pennsylvania Labor Relations Act by deleting from clause (c) of Section 3 of that Act, the following words: "or the National Labor Relations Act as amended from time to time."

1947

The Labor Management Relations Act, 1947, 61 Stat. 136-162, amended the National Labor Relations Act of 1935, in pertinent part, to read as follows:

"SEC. 8(a) It shall be an unfair labor practice for an employer— * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice)

to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: * * *

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) * * *

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: * * * (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9."

1951

Public Law 189, October 22, 1951, 65 Stat. 601, further amended the National Labor Relations Act, in part, as follows:

"(b) Subsection (a) (3) of section 8 of said Act is amended by striking out so much of the first sentence as reads 'and (ii) if, following the most recent election held as pro-

vided in Section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:' and inserting in lieu thereof the following: 'and has at the time the agreement was made or, within the preceding 12 months received from the Board a notice of compliance with sections 9(f), (g), and (h) and (i) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement;"

APPENDIX B

The following appendix is copied directly from pages 40-48 of the brief for the appellee, JOSEPH GARNER and A. JOSEPH GARNER, trading as CENTRAL STORAGE AND TRANSFER COMPANY, in the Supreme Court of Pennsylvania in the instant case:

D. The primary picketing enjoined is not an unfair labor practice under the Federal Labor Management Relations Act

The final, narrowest, last-ditch contention of appellants (at page 55, point VI of their brief) is that the primary picketing enjoined is proscribed by the Labor Management Relations Act. This argument calls for an analysis of the scope of certain unfair labor practice provisions of that act, principally section 8(b) (1) and section 8(b) (2). In this respect, the purpose of Congress in that Act, as declared in *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301, 306, 69 S. Ct. 584, 587, was not to displace state power to deal with unfair labor practices, but

> "merely to preclude conflict in the administration of remedies for the practices proscribed by sec. 8."

Section 8(b) (4), the secondary boycott provision, was properly distinguished by the learned court below (187a). The Supreme Court of the United States in *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665, 670-671, 71 S. Ct. 961, 964, has come to the same conclusion that,

> "the applicable proscriptions of sec. 8(b) (4) are expressly limited to the inducement or encouragement of *concerted* conduct by the employees of the neutral employers".

This section is not now invoked by appellants.

Section 8(b) (1), declaring that it shall be an unfair labor practice for a labor organization "to restrain or coerce" *employees* in the exercise of certain guaranteed rights falls short of the coercion of the employer, Central, found in this case. The inapplicability of section 8(b) (1) to peaceful organizational picketing, or to any picketing not accompanied by violence or threats, overt or implicit, clearly appears from the opinion of the learned court below (185a-187a) and the lead-

ing case of *Watson's Specialty Store*, 80 N.L.R.B. 533, 539, 547 (1948), enforced in *N.L.R.B. v. Local 74, etc.*, 181 F. (2d) 126, affirmed on other grounds in 341 U.S. 707, 71 S. Ct. 966, 969. The states are accordingly free to assume jurisdiction, at the suit of private parties, of peaceful organizational picketing: Greenberg, Strikes Indirectly Prohibited by Section 8(b) of the Taft-Hartley Act, *Proceedings of Fourth Annual Conference on Labor at New York University*, pages 484 and 485 and note 75; *Kincaid-Webber Motor Co. v. Quinn*, 241 S.W. (2d) 886 (Mo. 1951); *Goodwins, Inc. v. Hagedorn*, 303 N.Y. 300, 101 N.E. (2d) 697 (1951).

Nothing to the contrary appears in the only case relating to section 8(b)(1) cited by appellants (page 57, note 78). In *Direct Transit Lines v. Teamsters Union*, 52 A.L.C. 233, 21 CCH Labor Cases par. 66,774, 29 LRRM 2492 (W.D. Mich. 1952) the court's sole statement with respect to that section in denying a motion to remand was the following:

> "It is alleged in Paragraph 6(a) of the complaint that the defendants attempted unlawfully to intimidate and coerce the plaintiff's drivers into joining the defendant union. This allegation, if true, would be a violation of Sec. 8(b)(1) of the Act, which reads as follows * * *"

The only remaining unfair labor practice provision now invoked by appellants is section 8(b)(2), 29 U.S.C.A. sec. 158(b)(2), pocket part. As correctly summarized by appellants (at page 57 of brief for appellants),

> "Section 8(b)(2) of the Labor-Management Relations Act of 1947, supra, makes it an unfair labor practice for any union or its agents 'to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)' which latter subsection prohibits any employer from discriminating 'in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in a labor organization.' Not only a strike, but the mere threat of one, to force an employer to accede to union demands for a contract provision requiring union membership as a condition of employment without legal sanction * * * has been held by the National Labor Relations Board to violate Section 8(b)(2)."

We have read with attention all five of the cases construing this section cited by appellants (at page 58 and note 79 of their brief) and have concluded without hesitation that this case is not controlled thereby.

(1) In re: *American Radio Association*, 82 N.L.R.B. 1344, 1345, 24 LRRM 1006, appellant's first citation, involved union security provisions with which the Labor Management Relations Act was particularly concerned. It arose in an industry where the work force typically exceeded available employment and unions utilized agreements requiring the employer to secure needed employees only through union hiring halls, open only to union members. Noting that the hiring hall employment procedure adamantly demanded "closely resembles the conventional union shop" the Board held that,

> "Respondents, by insisting upon the inclusion of the hiring hall employment procedure in any contract to be negotiated with the Employers, engaged in unfair labor practices within the meaning of Section 8(b)(2) of the Act."

(2) In re: *United Mine Workers of America*, 83 N.L.R.B. 916, 920, 24 LRRM held that the union, in "causing the Companies to execute an unauthorized union shop agreement, violated Section 8(b)(2) of the Act."

(3) In re: *Denver Building Trades Council*, 90 N.L.R.B. 1768, 1769, 26 LRRM 1382, notwithstanding the absence of a request for a closed shop contract, held that,

> "maintenance by Shore of closed-shop conditions, or even of a policy of discriminatory hiring on the basis of union membership in a craft union, would alone have been enough to bring him within the ban of Section 8(a)(3) * * *."

(4) In re: *Mackay Radio and Telegraph Co.*, 90 N.L.R.B. No. 106, 26 LRRM 1579, 1580, recognized that an "activity which has both a lawful and unlawful objective is unlawful" and observed:

> "ACA adamantly insisted that the Respondent agree to an unlawful union-security contract * * *. Such a strike, to compel the Respondents to violate a clear Congressional mandate as expressed in Section 8(a)(3) of the Act, was a strike which, if ACA had been a respondent, we would have found to violate Section 8(b)(2) of the Act * * *."

(5) In the fifth case cited by appellants, *N.L.R.B. v. National Maritime Union*, 175 F. (2d) 686 (C.C.A. 2, 1949) Circuit Judge Frank approved the Board's finding (quoted at page 688) that,

> "what NMU was demanding * * * was not merely a continuation of * * * the hiring-hall clause * * * but a continuation of the practice outlined above, by which preference in job assignment and job retention was given to NMU members."

He further approved the Board's legal conclusion (quoted at page 689) that,

> "Section 8(b)(2) * * * extends * * * to instances in which the union * * * seeks to cause the employer to accept conditions under which any non-union employee or job applicant will be unlawfully discriminated against."

Judge Frank quoted Senator Taft's description (note 3, page 689) of the evils of closed-shop arrangements as "best exemplified by the so-called hiring halls on the west coast where shipowners cannot employ anyone unless the union sends him to them." The court therefore held (at page 690) that,

> "There is ample record evidence to support the Board's findings of fact. And the statute, in the light of its clear legislative history relative to hiring-halls, justifies the Board's legal conclusions."

Section 8(b)(2) accordingly does not apply, on the precise facts presented. Appellants have cited no decisions that support their contention (at page 38) that "picketing, as was found in the instant case, to coerce an employer to compel his employees to join a union, falls squarely within the provision." The ambit of Section 8(b)(2) is more narrow, as it is limited to discrimination in regard to hire or any condition of employment, and is further limited, of course, to discrimination. Appellants do not contend that there would be that particular type of discrimination, as to conditions of employment if Central had required its employees to become members of the picketing union (as a Teamster local attempted to bring about in *Silhouette v. Local No. 575, etc.*, 300 Mich. 746, 16 N. W. (2d) 145, 150), "by paying their initiation fees, regardless of whether or not the drivers wished to join." Further, an unfair labor practice under section 8(b)(2) is dependent

upon a purpose "to cause an employer to discriminate against an employee" in the manner prescribed. Appellants have pointed out no discrimination whatsoever, although discrimination is of the essence. Plainly, as stated in 56 *Corpus Juris Secundum* 212,

> "There is no discrimination where union and nonunion members are similarly treated."

Section 8(b)(2), read in conjunction with interrelated section 8(a)(3) proscribes only discrimination, and discrimination of a limited kind at that, where the objective is "to encourage or discourage membership in any labor organization." That objective is here present, "to encourage" membership in Teamsters. That does assure the harmony with the purposes of Congress of the action of the court below. More than the presence of that goal, however, is necessary before Section 8(b)(2) applies in view of its limiting language.

Accordingly, we find in the Labor Management Relations Act no basis for appellants' contention that that federal legislation proscribes the primary picketing enjoined.